It is interesting to note that during the pendency of this action the attorneys for the defendant appealed to the legislature for relief and secured the passage of an amendment to the code section,[9] which might have exempted the defendant from liability if all the debts and liabilities of the corporation had been paid. Further amendment to cover the exact situation presented by this case does not appear desirable. The code section in its present form is easy to comply with, does not interfere with the proper conduct of corporate affairs, and furnishes valuable protection both to existing stockholders and the investing public. *R. H. M.*

EVIDENCE: ADMISSIBILITY OF TESTIMONY OF SURVIVOR TO TRANSACTION AGAINST ESTATE OF DECEDENT—Dead men can tell no tales. But that is no reason for preventing the living from telling their story against the dead. Yet such a reason seems to underlie that provision of the California Code of Civil Procedure[1] which excludes the testimony of a survivor of a transaction with a decedent when offered against the latter's estate.

The rule excluding otherwise valid testimony has no sound policy to support it.[2] It is merely a relic of the ancient common law maxim rendering incompetent the testimony of all parties in interest as potential liars, and survived as an exception when California accepted the general principle that "all persons, without exception . . . may be witnesses."[3] The provision evidently aims to protect the estates of the dead from the claims of those who may be encouraged to falsify by the inability of the dead person to contradict. But is it any more important to protect the estates of the dead than the estates of the living, who by the instant rule are prevented from offering otherwise perfectly competent evidence in establishing their just claims? Is not cross-examination, not to speak of the oath and other safeguards, a sufficient protection against the fabrications of the unscrupulous? Excluding the truth should not be justified by reviving obsolete shibboleths.

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[9] Amdt., 1917, to Cal. Civ. Code 309, ". . . The liability of a director of a corporation heretofore incurred shall not exist in any case where all of the debts and liabilities of the corporaton to creditors having been paid, the capital stock divided, withdrawn, or paid out, constituted all of the capital stock of the corporation, and the same was paid out, withdrawn, or divided with the consent of the stockholders to or among themselves." It was held that "outstanding obligations of the corporation to convey lands, although assumed by another party, constituted a liability to creditors within the meaning of this law and prevented the application of the saving clause therein to the particular facts of this case."

[1] § 1880 subdiv. 3, which reads: "The following persons cannot be witnesses: 3. Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator upon a claim, or demand against the estate of a deceased person, as to any matter or fact occuring before the death of such deceased person."

[2] See Wigmore on Evidence § 578. See also §§ 1576, 2065.

[3] Cal. Code Civ. Proc. § 1879.

The anachronism of the exception explains why the courts have been very slow in applying it to exclude evidence. Thus the provision has been limited strictly to cases involving money claims and hence does not affect suits pertaining to realty,[4] or materialmen's liens,[5] or to establish or enforce a trust,[6] or to establish the existence of a partnership,[7] or in an application for a family allowance,[8] and the like; nor is the code section interpreted to exclude the testimony of parties so obviously associated in interest with the plaintiff as the stockholders of a corporate plaintiff,[9] or the wife of a plaintiff[10] or his own employees.[11] Also the testimony is not excluded when the survivor is defendant instead of plaintiff,[12] or a fortiori where the testimony relates to facts after the death of decedent.[13]

In accordance with this tendency to narrow the provision as much as possible we should have expected that the courts would be very free in finding an implied waiver thereof; and that they would not exclude otherwise proper evidence in the absence of prompt objection. The estate of the deceased can waive the benefit of the code section when the testimony is in its favor,[14] and why is it not just as competent to waive the section when the advantage is the other way? When interest was a general ground of exclusion in this state, the incompetency was considered waived unless the adverse party made immediate protest.[15] Under a provision in the California Practice Act similar to the code section under discussion it was held that failure to object promptly constituted a waiver of the benefit thereof.[16] This is the general rule today in other states,[17] and is the result reached in the recent California case of Thompson v. Koeller,[18] which also found an implied waiver in the failure to protest.

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[4] Wadleigh v. Phelps (1906) 149 Cal. 627, 639, 87 Pac. 93, (action to declare deed a mortgage); Bollinger v. Wright (1904) 143 Cal. 292, 76 Pac. 1108, (action to quiet title); Calmon v. Sarraille (1904) 142 Cal. 638, 76 Pac. 486, (action to establish trust in land).

[5] Booth v. Pendola (1891) 88 Cal. 36, 43, 23 Pac. 200, 25 Pac. 1101.

[6] Myers v. Reinstein (1885) 67 Cal. 89, 7 Pac. 192.

[7] Bernardis v. Allen (1902) 136 Cal. 7, 68 Pac. 110.

[8] Estate of McCausland (1878) 52 Cal. 568, 576.

[9] Merriman v. Wickersham (1904) 141 Cal. 567, 570, 75 Pac. 180.

[10] Bayless v. Reed (1920) 31 Cal. App. Dec. 1079, 190 Pac. 1211.

[11] City Savings Bank v. Enos (1901) 135 Cal. 167, 172, 67 Pac. 52.

[12] Sedgwick v. Sedgwick (1877) 52 Cal. 336.

[13] McMurray v. Bodewell (1911) 16 Cal. App. 574, 117 Pac. 627.

[14] Chase v. Evoy (1877) 51 Cal. 618.

[15] Brooks v. Crosby (1863) 22 Cal. 43; Jones v. Love (1858) 9 Cal. 68.

[16] King v. Haney (1873) 46 Cal. 560, 13 Am. Rep. 217. This was based on § 393 of the Cal. Practice Act, which was the predecessor of Cal. Code Civ. Proc. § 1880 (3). Section 393 was repealed in 1870, but made part of the present code, Cal. Stats. 1873-4, p. 381. Section 393 unlike Cal. Code Civ. Proc. § 1880 (3) was applicable in all cases and was not limited to claims and demands. See Booth v. Pendola, supra, n. 5.

[17] 40 Cyc. 2349, 2351. Wigmore on Evidence §§ 18, 486, 584, 586; 6 A. L. R. 756; Ann. Cas. 1918A 471, 1913A 679.

[18] (1919) 30 Cal. App. Dec. 582, 585 "No part of [the testimony] was

Hence it was quite startling to find the court in *Kinley v. Largent*[19] going so far as to hold that the benefit of the section requiring exclusion could not be foregone even by express waiver. In this case the attorney for the estate deliberately refused to take advantage of the code section, announcing to the court that to do so "would work an injustice upon the plaintiff." Hence he made no objection and the testimony of the plaintiff-survivor was let in. But both the trial and appellate tribunals refused to take into account in any way the evidence so admitted, holding that the code section made it absolutely incompetent for any purpose.

Would it not have been more in accordance with sound policy and the tendency of previous decisions if the court had seen its way clear not to extend an archaic rule by such an interpretation of the code section? Indeed would it not be better for the legislature to discard the whole rule,[20] and instead, in accordance with modern ideas, let the truth in for what it is worth?[21]

J. C. S.

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objected to upon the ground urged. Under the circumstances we have no doubt that the benefit of the statute (Code Civ. Proc. § 1880 subdiv. 3) was waived and the evidence properly admitted." Kerrigan, J. The case was taken up to the Supreme Court. 60 Cal. Dec. 167, 173, 191 Pac. 927. But that court did not discuss the point, saying: "There are a number of other points . . . advanced for the first time in the appellants' reply brief. In view of this latter circumstance we feel under no necessity for discussing them further than to say we have looked at them and find none of them good ground for reversal."

[19] (Dec. 30, 1920) 34 Cal. App. Dec. 190, also speaking through Mr. Justice Kerrigan. Hearing granted in Supreme Court Feb. 28, 1921. And see, accord, Palmer v. Guaranty Trust Co. (1920) 31 Cal. App. Dec 262, 561, 188 Pac. 302, (refusing to let plaintiff authenticate handwriting of deceased). In denying petition for rehearing the court said: "Conceding no objection was interposed. . . nevertheless the same must be deemed of no evidentiary value."

[20] Wigmore points out two possible safeguards in case the rule is abolished. One would require some corroboration of the testimony so let in; the other would permit the estate to introduce any writings of the deceased. See Wigmore on Evidence, supra, n. 3. See also Colburn v. Parrett (1915) 27 Cal. App. 541, 544, 150 Pac. 786, commented on in 4 California Law Review, 65, which suggests that if his testimony is corroborated a plaintiff may testify he kept account books and that the books produced are the ones kept by him at the time of the transaction, and then such account books will be admissible.

[21] The present condition of decisions on the point in question is rather conflicting. Division One of Department One first held that there could be an implied waiver from failure to object in time. Thompson v. Koeller, supra, n. 18. Then Division One of Department Two held there could *not* be such an implied waiver. Palmer v. Guaranty Trust Co., supra, n. 19. Now the first named court goes back on itself and holds that there can not be even an express waiver. Perhaps the language by the Supreme Court in Thompson v. Koeller (quoted supra, n. 18) is a decision approving the doctrine of implied waiver, but the wording is so general that it cannot be considered as conclusive authority. In Tipps v. Landers (1920) 59 Cal. Dec. 546, 549, 190 Pac. 173, there is also language implying that there may be a waiver of the code section.